ABDUL AZIZ ATAN & ORS.

v.

LADANG RENGO MALAY ESTATE SDN. BHD.

HIGH COURT MALAYA, MUAR
MAHADEV SHANKAR J
[ORIGINATING MOTION NO. 19 OF 1983]
15 DECEMBER 1984

LABOUR LAW: *Employment - Claim for termination benefits - Whether payable - Sale of shares, in company - Whether estate sold - Whether change of employer had occurred.*

COMPANY LAW: *Change in shareholders - Whether constituted change in ownership or business or identity of company.*

The respondent company had an issued capital of 5,000,020 fully paid ordinary shares of RM1 each. The shares were registered in the names of 25 owners. On 10 March 1981 the company entered into a written agreement to sell the shares to Gemas Bahru Estate Sdn. Bhd. The main asset of the company consisted of 1948 acres of land on which the company carried on the business of rubber estate and oil palm. Approval of the Federal Investment Committee was subsequently obtained and the shares thereafter transferred to the purchaser. On the 3 November 1982 a claim was initiated under s. 69 of the Employment Act 1955 for termination benefit under reg. 8 of the Employment (Termination and Lay-off Benefits) Regulation 1980, for RM168,670.40, representing the sum alleged to be payable to the applicants, employees of the estate. The Enquiry Officer gave this decision in favour of the respondent company. The applicants appealed.

Held:
The appeal must fail. There was no change of ownership of business within the meaning of reg. 8. An incorporated company is a legal person separate and distinct from the shareholders of the company, and a change of shareholders does not constitute a change in the identity of the company. The applicants were suing the company, not the shareholders and there was no change in the identity of the company.

[Appeal dismissed].

Cases referred to:
Kumpulan Kamuning Sdn. Bhd. v. Rajoo and 200 Ors. [1983] CLJ (Rep) 207; [1983] 2 MLJ 400
Dallow Industrial Properties Ltd. v. Else [1967] 2 All ER 30
Woodhouse & Anor. v. Peter Brotherhood Ltd. [1972] 3 All ER 91
Cameron v. Hector Finlayson & Co. Ltd. [1967] (2) 1 TR 110
Wright v. Charlton Concrete Co. Ltd. [1967] 2 TR 72

Legislation referred to:
Redundancy Payments Act 1965 [UK], s. 13(1)
Employment Act 1955, s. 69
Employment (Termination and Lay-Off Benefits) Regulations 1980, reg. 8

Other source referred to:
Halsbury's Laws of England, 4th Edn., Vol. 7., Para. 1, 82 & 100

For the appellants - B. Lobo; M/s. Lobo & Associates
For the respondents - Ajit Singh; M/s. Vohrah & Tan Chee Lan

JUDGMENT

Mahadev Shankar J:

This Appeal turns upon the proper application of reg. 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 (hereafter referred to as reg. 8 and the Regulations).

Ladang Rengo Malay Estate Sdn. Bhd. (the Company) as on 10 March 1981 had an issued capital of 5,000,020 fully paid ordinary shares of RM1 each (the said shares) which were registered in the names of 25 owners (the registered owners). On that date their authorised agents entered into a written Agreement (the said Agreement) to sell the said shares to Gemas Bahru Estate Sdn. Bhd. (the Purchaser) for Ringgit Fifteen Million and Sixty only.

The main asset of the Company consisted of 1948 acres of land (hereafter referred to as the said land) on which the Company appears to have carried on the business of a rubber estate and oil palm.

Clause 11 of the said Agreement provided as follows:

> The Vendors hereby undertake FIRST to carry out the affairs and management of the Company in a manner more or less similar to the manner in which the same have been carried out in the past SECONDLY not the damage or cause to be done any damage to the rubber trees or oil palms on the said land by unreasonable or excessive tapping THIRDLY on or as soon as possible after the Completion date to produce to the Purchaser a complete list of trade liabilities incurred since the date of this Agreement AND the Vendors hereby declare that the balance of the Trade Creditors Accounts on the Completion Date shall not exceed sum of RM50,000 and that the Vendors shall personally be liable and pay for any sum in excess thereof and that no contingent liability has arisen by reason of any guarantee given by the Company.

Clause 16 of the said Agreement provided as follows:

> The Purchaser hereby agrees with the Vendors that subject to the Vendors fulfilling their undertaking contained in the Second Limb of Clause 11 hereof the Purchaser shall have no claim whatsoever against the Vendors in respect of the said land and the Purchaser shall be deemed to have been completely satisfied with everything done by the Directors on or as regards the said land.

The said Agreement was subject to the approval of the Federal Investment Committee and it would appear that this was subsequently obtained and that the said shares were thereafter transferred to the Purchaser.

On 3 November 1982 a claim was initiated under s. 69 of the Employment Act 1955 for termination benefits under reg. 8. The claim is for RM168,670.40, representing the sum alleged to be payable to Abdul Aziz bin Atan and 87 other employees of the Estate. The claim is said to be as for April 1982. It alleges that the sale took place without notice to the employees although there had been a change in the Manager and staff at the Estate Office. The personal particulars of the employees concerned were attached to the complaint as Exhibit C1.

The matter eventually came up for disposal on 2 April 1983. The complaints were represented by Mr. B. Lobo of counsel. The company appeared by its director Mr. Teh Wan Boon.

In the preliminary discussion the parties agreed that the point in dispute was whether the Estate was sold and if so whether a change of employer took place.

After amending the claim to include wages in lieu of notice Abdul Aziz bin Atan gave evidence as follows:

I made this claim as the estate had been sold. In the agreement of sale dated 10 March 1981 they were 25 registered owners of the estate. (Agreement marked on Ex. (2)). The said 25 owners sold the estate to Gemas Baru Estate Sdn. Bhd. I have made a claim for termination benefits and wages in lieu of notice against the new owners of the estate at Pejabat Perhubungan Perusahaan Kluang. I also made the same claim against the new owners of the estate at the same office.

I wish to correct my previous statement that there was no change on the staff of the estate when the transaction took place in April 1982.

In answer to the Enquiry Officer he said:

When I learnt of the sale of the estate, I did make a claim for termination benefits against both the new and former owners, but was not paid as they claimed that it was only the sale of the shares of the estate.

Most of the complainants in this case are still working for the estate. Some however, have left after the sale was made.

We are all also working under the same terms and conditions of service as prior to the sale of the estate.

Teh Wan Boon declined to give evidence and the parties then made their respective submissions.

Mr. Lobo's submission before the Enquiry Officer was substantially the same as that which he made before me. Mr. Teh submitted that there had been no change of ownership and that the Estate is still owned by the Company. He referred to a Collective Agreement between NUPW and the Estate made on the 14 February 1980 which was still in force on the date of the transfer of the shares. An amended list of complainants was submitted on the 25 April 1983 and the Enquiry Officer gave his decision on the 16 May 1983.

He expressed his findings as follows:

I am satisfied that all the 88 complainants were employees of the Rengo Malay Estate Sdn. Bhd. and that they were working for the defendant at its rubber estate before and after the sale of the defendant's shares on the same terms and conditions of service.

I am also satisfied that the shares of the Rengo Malay Estate Sdn. Bhd. did change hands, with the legal entity of the company remaining the same even after the transfer of shares took place.

Further, I am satisfied that all the complainants were still working for defendant without loss in seniority or break of service after the sale of the shares took place. The services of the complainants were never terminated.

The claimants then appealed.

As the matter was presented to me, it seems that the sole issue with which I am concerned may be expressed thus:

Where all the employees of a corporate organisation continue in employment without any break on the same terms and conditions of service, does reg. 8 require it to be legally presumed that their contracts of service have been terminated merely because there has been a change in the ownership of the shares capital of that organisation, notwithstanding that there has been no change in the business being carried on by the corporation?

Kumpulan Kamuning Sdn. Bhd. v. Rajoo and 200 Ors. [1983] CLJ (Rep) 207 (FC) is a decision of the Federal Court but clearly distinguishable on the facts. The employees affected by that decision were employed in the Bukit Lembu Division of the appellant Company. That Division

was sold to the National Land Finance Co-operative Society Ltd. Thus the case did not deal with the sale of shares in a limited company but a sale by the company of a part of its operations which thereby passed into new hands. The appellants Company then terminated the contracts of service of their employees affected by the sale with effect from the date of the hand-over. The decision turned on whether the employees had a choice whether to accept an offer of re-employment or insist on termination benefits being paid in accordance with reg. 8.

The only other local decision cited to me was the unreported decision of *Associated Motor Industries (M) Sdn. Bhd. v. Thangaraju a/l Poomie* K.L. High Court O.M. A44 of 1982. Mr. Lobo has strenuously submitted that on the principle of *stare decisis* I should follow this decision, and further states that it is on all fours with the facts before me.

In the case, the appellant limited Company, in the business of assembling motor vehicles at Shah Alam, had all its shares owned initially by Wearne Brothers. Wearnes sold out to the Ford Motor Company. Thangaraju contended that the take-over amounted to a change in the ownership of the business and Razak J agreed.

I must confess that I have had some difficulty in applying the judicial reasoning in the case to the facts before me. Even though the said shares had changed hands here, the fact remains that the Company is still the owner of the Estate i.e. there is no change in the ownership of the business.

In asking Mr. Lobo to address me on the mischief aimed at by reg. 8 I had in mind the example of a small family company owned say by a husband and wife who are unfortunately killed in a crash. The business of the company continues as before and the employees continue in service without a break, under their contracts of employment with the company. Does reg. 8 require us to presume that a change has occurred in the ownership of the business because the shares pass into the hands of their Administrator of the deceased, and again when it passes into the hands of the beneficiaries under a will or an intestacy?. Does it matter in such a case that there have been changes in the interim in the constitution of the Board, or of senior management in the Company?

Mr. Lobo submits that reg. 8 must be given a beneficial construction in favour of the employee and that the words "whether by virtue of a sale, or other disposition or by operation of law" are very wide. He stresses that the Regulation uses the word "**deemed** to have been terminated" and he says that it thereby follows that even if no termination of employment has in fact taken place, it must be presumed in the case before me and in the example I have just cited. If he is right, the proposition he has advanced will have far reaching consequences for the economic life of this country.

With respect, the focal point of reg. 8 is the word "change". That is where the emphasis must be placed. The Regulation requires a metamorphosis not only in the ownership of a business but also in the business for the purpose of which an employee is employed.

It is trite law that an incorporated company is a legal person separate and distinct from the shareholders of the company. The company from the date of incorporation has perpetual succession and the Companies Act provides that the liability on the part of the shareholders to contribute to the assets of the company will be limited in the manner provided by law and its memorandum and articles of association. The whole point of forming a limited company is that the shareholders can have in their hands the management of the business without incurring the risk of being under unlimited liability for the debts of the company. Authority for this proposition should be found in any textbook on law relating to companies (but see *Halsbury's Laws of England* 4th Edn. Vol. 7 para. 1, 82 and 100).

In the present case there was no change whatsoever in the constitution of Ladang Rengo Malay Estate Sdn. Bhd. The company did not change its identity or personality. And it continued to own all the assets of the estate which were an integral part of the business for the purposes of which the applicants were employed.

But it is submitted for the applicants that for the purposes of reg. 8 one should not look to the company but have regard to the change in the identity of the shareholders. In other words, it is being submitted that the business of Ladang Rengo Malay Estate Sdn. Bhd. was not owned by the company but by the shareholders. This proposition violates the most elementary concept of company law. A single shareholder of a company only owns the shares in his name. He has no right to lay his hands on the assets of the company. In certain circumstances it is of course within the power of the shareholders to wind up a company and have the nett assets thereof, after satisfaction of all its liabilities, distributed to themselves. But until that happens property standing in the name of the company belongs to the company.

The stand taken by the applicants that the shareholders are the owners of the company and that the previous shareholders and the new shareholders are jointly and severally liable for the payment of the termination benefit which they claim, is wholly inconsistent with the format in which this claim has been cast. For the applicants have not sued these shareholders. They have sued the company. Their claims is a contradiction in terms.

For myself, I would say, with respect, that a plain of reg. 8 does not support the construction Mr. Lobo sought to place upon it. I would require far clearer words in a statute if the intention was, as is now being argued to stand the provisions of the Companies Act on its head. At the risk of repetition I would say that this is the consequence which would follow, because the liabilities of the company would then be transferred directly to its shareholders regardless either of the absence of any privity of the contract between them and the company's employees, or the legal limitation of the shareholders' liability.

Thus far I have not referred to the English authorities and in particular to s. 13(1) of the English Redundancy Payments Act 1965.

Admittedly the wording of the section is different from reg. 8 in that not only does it require that there should be the kind of change which reg. 8 requires (as as to this the wording is identical), but also it requires that there has to be a physical termination of employees' contract of employment by the previous owner in connection with the change.

In other words whereas the English section requires that there should be a change in ownership and also a physical termination of the contract of employment by the previous owner, the Malaysian regulation assumes that such a termination has occurred if the necessary change has taken place.

Bearing this in mind, I would with respect, say that some assistance can be derived from the English authorities which are persuasive to that extent. Of the many cases cited to me I found two helpful namely *Dallow Industrial Properties Ltd. v. Else* [1967] 2 All ER 30 (especially Diplock LJ at p. 33) and *Woodhouse & Anor. v. Peter Brotherhood Ltd.* [1972] 3 All ER 91 (especially Buckley LJ at p. 98).

One should be slow to apply tax cases in other areas but the distinction between the shareholders of a company and the company itself has been clearly brought out in *Cameron v. Hector Finalyson & Co. Ltd*. [1967] (2) 1 TR 110 and *Wright v. Charlton Concrete Co.*

Ltd. [1967] 2 TR 72. This last case has very close parallels to ours in the entire shareholding of the company changed hands but the tribunal held that there was no change of ownership of business within the meaning of s. 13(1) of the English Act.

I am indebted to both Mr. Lobo and Mr. Ajit Singh for providing me with meaningful assistance in coming to a decision in this matter.

The appeal is dismissed with costs.

Also found at [1985] 1 CLJ 255